

Final Regulatory Flexibility Analysis

The type of small business affected by the agricultural performance standards in proposed ch. NR 151, subch. II, are crop and livestock productions. DNR estimates that there are over 55,000 livestock facilities and about 23,000 cropland operations in the state that meet the definition of a small business. Some livestock facilities with 1,000 or more animal units affected by proposed NR 243 may be classified as small businesses. Also, some livestock producers with operations under 1,000 animal units who meet the definition of a small business may be affected by proposed NR 243 if they meet the criteria of a point source under federal regulations.

For the non-agricultural performance standards in proposed ch. NR 151, subch. III and IV, any small business that undertakes construction involving land disturbance on sites over 5 acres (1 acre in 2003) will be affected. These businesses must meet the performance standards both for the construction phase and the post-construction phase of the project(s). Compliance with the performance standards will be identified in both an erosion control plan and a storm water management plan. Small businesses established after the effective date of the proposed rule that are required to obtain industrial storm water permits must also meet post-construction performance standards by describing and installing best management practices (BMPs) as required in their storm water pollution prevention plan. Managers of turf areas, including golf courses, will also be affected by the non-agricultural performance standards. Revisions to NR 216 that incorporate the non-agricultural performance standards will impact small businesses.

I. Methods for Reducing Impacts On Small Business

A. Less stringent compliance or reporting requirements

Agricultural Businesses

For crop producers and for livestock or crop/livestock operations that were in existence when Act 27 went into effect and with less than 1,000 animal units, compliance with the agricultural performance standards and prohibitions in NR 151 is not required unless at least 70 percent cost-sharing is offered (90 percent if a determination of economic hardship is made). The proposed code language in NR 151.09 and NR 151.095 does not directly impose reporting requirements on crop and/or livestock operations with less than 1,000 animal units. Any reporting requirements are largely the responsibility of the county staff who would determine the status of cropping and livestock operations, determine whether or not those operations are in compliance with the agricultural performance standards and prohibitions, notify landowners who are not in compliance, determine costs of compliance and cost-share eligibility for landowners, work with the producer to implement BMPs, and verify that the sites meet the performance standards and prohibitions following implementation.

Counties that choose to enforce the performance standards and prohibitions through ordinances may require some form of reporting. It is not possible to determine what type of reporting or the impact such reporting would have on these types of operations. In general, the purpose of relying on performance standards and prohibitions is more conducive to minimal reporting, allowing operations to rely on more visual, rather than technical, methods of determining compliance. Reporting required by counties would likely be minimal due to the large number of facilities, which will need to meet the standards. The purpose of the reporting will be to make sure BMPs are properly installed and maintained. If counties are not implementing the performance standards, the state may need to enforce and reporting requirements are likely to be greater than the counties but will apply to fewer facilities. Due to workload, the state will focus on facilities that have the greatest environmental impact.

Compliance and reporting requirements should not change significantly for livestock operations with 1,000 or more animal units. Many of the proposed performance standards and prohibitions are already addressed as part of the Wisconsin Pollutant Discharge Elimination System (WPDES) permits that these facilities must obtain. These permitted facilities have only annual reporting requirements for land application of manure and some have inspection requirements for specific compliance issues. Groundwater monitoring is sometimes required.

Non-Agricultural Businesses

The compliance and reporting requirements for construction sites will be the same as imposed currently under NR 216. The rules provide for a clarification of the performance standards when developing an erosion and sediment control plan or a storm water management plan, but they do not require additional reporting. Small businesses have been meeting the current reporting and compliance requirements of the permit program without any difficulty. Additionally, the rules specify that BMPs must be implemented to the maximum extent practicable, which offers the contractors, developers, etc. a degree of flexibility in meeting the performance standards.

Golf course managers and other small businesses that apply fertilizers on areas of five acres or more will need to meet a fertilizer application performance standard. There are no regular reporting requirements associated with this performance standard, but a business that is found to be out of compliance may need to demonstrate that a management plan was in place.

B. Less stringent schedules or deadlines for compliance or reporting requirements.

Agricultural Businesses

Existing livestock facilities with less than 1,000 animal units and cropping operations are only required to comply with the performance standards and prohibitions if cost sharing is provided. Implementation schedules and deadlines, consequently, will depend on the availability of cost sharing. The proposed codes set up time frames for compliance once cost sharing is available. Counties, however, may establish different time frames although cost sharing is still required. Since compliance is contingent on cost-share availability and cost-share dollars will be limited each year, it may be years before the standards are fully implemented and less stringent time frames would only stretch compliance out further.

In addition, the nutrient management performance standard does not begin to take effect until January 1, 2005 for existing cropland practices located in watersheds containing Outstanding or Exceptional Resource Waters, nutrient-impaired waters on the 303(d) list, or source water protection areas. The standard applies to all other existing cropland practices on January 1, 2008. New cropland practices will need to meet the performance standards one year after the effective date of the rule.

New crop practices and livestock facilities with less than 1,000 animal units will need to be in compliance with the performance standards and prohibitions from the date the rule becomes effective, regardless of the availability of cost-sharing. It is more cost effective for new facilities to construct BMPs to comply with performance standards up front rather than correct problems later on. The compliance deadline associated with nutrient management performance standards is outlined in ch. ATP 50, Wis. Adm. Code.

Permitted livestock operations' annual reporting requirements for land application of manure or reporting requirements associated with facility-specific compliance issues are not expected to

change as a result of the proposed code revisions. The need for schedules to achieve compliance during the term of the reissued permit would be determined on a case-by-case basis.

Non-Agricultural Businesses

The schedule for compliance and reporting are the same as those under the existing NR 216. A Notice of Intent must be submitted 14 working days prior to commencing construction. Once construction commences, the required plans must be followed. Revisions to NR 216 refine the performance standards for the erosion and sediment control plan and storm water management plan and does not change the time schedule. Industrial permittees are required to submit a storm water pollution prevention plan prior to construction of a new site as in the current NR 216. Their storm water management plan and BMP implementation will, however, have a clear set of performance standards to meet.

C. Consolidation or simplification of compliance or reporting requirements.

Agricultural

For livestock facilities with less than 1,000 animal units and for cropping practices, the majority of compliance efforts are expected to be administered through the counties. The counties should provide a convenient, simple and recognizable contact for operations. In addition, many of the performance standards and prohibitions can be easily followed by the operator and may require only management or low-cost changes. However, compliance or reporting requirements will ultimately be determined by a given county. Department compliance and reporting requirements for livestock producers are not expected to change as a result of the proposed code changes. The department does not currently regulate crop producers as part of a regulatory program. Proposed ch. NR 151 creates a mechanism whereby the DNR may impose compliance or reporting requirements on crop producers. This will occur in a limited number of instances, primarily in cases where a practice or facility poses a significant adverse environmental impact in an area targeted for protection. The amount of applicable reporting or compliance requirements will be largely dependent on the cooperation and environmental impact of the operation.

For operations with 1,000 animal units or more, the proposed changes would not result in additional compliance or reporting requirements other than those in the current WPDES permitting process. The added clarifications and details regarding application, plan and specification and manure management requirements for WPDES permits should promote consolidation and simplification of communication between agricultural operations and DNR.

Non-Agricultural

DNR has an agreement with the Department of Commerce to allow them to regulate storm water discharges from commercial building sites in a manner that meets NR 216 requirements. This helps to reduce the burden on small businesses such that they do not have to get permits from two different agencies. This will continue to be true with the new rules. Also, a separate subchapter in proposed NR 151 was developed to address transportation facilities and their specific needs. For projects administered by the Wisconsin Department of Transportation (WisDOT), this subchapter will be enforced through the consultation and conflict resolution process specified in agreements between WisDOT and DNR. The department is responsible for enforcement of this subchapter for transportation facilities not administered by WisDOT. For projects administered by local government, it will be enforced through NR 216.

D. Performance standards in lieu of design or operational standards.

Agricultural

For all facilities and practices, the requirements are in the form of performance standards and prohibitions. Many of these promote self-assessments of the operation because they can be easily recognized and complied with through site management or low-cost improvements. However, compliance with some of the performance standards and prohibitions may require technical assistance with designs, operational standards, or written management plans.

For operations with 1,000 animal units or more, there are revisions that go beyond the performance standards and prohibitions. These typically clarify the type of information submitted to DNR that allow department staff to more effectively and efficiently process WPDES permits or review technical designs.

Non-Agricultural

Under NR 216, small businesses were already exposed to performance standards. These rules further refine those performance standards, establishing goals for erosion and sediment control at the site. Businesses are free to select whatever measures they feel are appropriate to meet the performance standards.

E. Exemption from any or all requirements of the rule.

Agricultural

Crop producers and livestock operations with less than 1,000 animal units cannot be wholly exempted from applicable performance standards and prohibitions because (1) the authorizing statutory legislation was specifically established to apply to these operations (e.g. nonpoint source agricultural operations) and (2) these sectors need to give further consideration to the impacts of their operations on water quality. Conditional exemptions based on the availability of cost-sharing do exist.

For operations with 1,000 animal units or more, conditional exemptions do not exist with regard to WPDES permit requirements. Not all of the other proposed changes will affect every operation. However, if a proposed change does apply, exemptions are not available. Conditional exemptions may occur for performance standards and prohibitions not required by a permit.

Non-Agricultural

Under NR 216, a small business is required to apply for and comply with a construction site erosion control permit. This is a federal requirement with which the state must be in conformance. The process under the new rules is not changed. New performance standards are required for all facilities where more than 5 acres of land is disturbed. In the year 2003, these requirements will apply to construction sites of 1 acre or more, due to federal regulations. Construction site erosion, whether it is from a small business or a large one is still a major water quality problem and these sites have been equally regulated under NR 216. The new performance standards also include requirements for long-term storm water management. These standards are more stringent than previous standards and will require more capital expenditure for compliance. This will vary with the site. A small business building and parking lot can have a greater impact than a large business depending on the size and amount of imperviousness, and its proximity to a water resource. If a small business was exempt from meeting the long-term performance standards, then the level of control and the ability to achieve water quality standards will be significantly diminished. It should be noted that small parking lots under 5,000 square feet are exempt from the infiltration performance standard. Small businesses listed in NR 216,

subchapter II, are required at the state and federal level to apply for a permit and to be in compliance with the requirements of the permit.

II. Issues raised by small business during the rule hearings, changes made in the proposed rule as a result of alternatives suggested by small business and reasons for rejecting any alternatives suggested by small business.

Agricultural

A few farmers felt that agriculture would be severely impacted if the rules were enacted all at once. One farmer suggested a phase-in period of 20-30 years.

Response: The department believes there is a sufficient phase-in schedule for the nutrient management performance standard which will begin to apply in 2005 for existing croplands and livestock facilities in areas with certain water quality protection needs and 2008 for other existing croplands and livestock facilities. These and the other agricultural performance standards will be implemented as the required state cost sharing becomes available. At current funding levels, the "phase in" period is estimated at 25-31 years.

Several producers and producer associations stated that the rules will put Wisconsin farmers at a competitive disadvantage with other states.

Response: The department believes sufficient provisions are built into the rules to avoid or mitigate negative economic impacts on agricultural operations of any size and allow them to remain competitive. These provisions include 70% cost-sharing (90% for economic hardship cases), a delayed start to the nutrient management performance standard, provisions for payment of some producer contributions (labor, equipment and supplies) and technical assistance available to operations at the federal, state and local levels. The department modified the cost-share conditions to allow payments for certain BMPs in addition to installation costs.

Some farmers want uniform standards across the state to minimize interpretation by field staff while others argued for flexibility to accommodate Wisconsin's diverse topography and different farm operations.

Response: The department feels the rules strike a balance between uniformity and flexibility.

Farmers along with conservation staff commented that the rules are very complicated, making compliance difficult.

Response: The department will be drafting guidelines with the counties and other interested stakeholders and conducting extensive education to explain the rules information with easily understandable language and format.

Many producers and producer associations commented that the troubled agricultural economy cannot afford new regulations at this time, that the rules are too costly and that there needs to be adequate funding sustained over time.

Response: While the department acknowledges that the farm economy is facing difficult times, it has an obligation to enact the legislation that has been in place for four years. The rules contain an economic hardship provision that offers 90% cost sharing to those who need it. The department agrees that the total costs will be significant and will continue to work with the governor and the legislature for sustained funding.

Several farmers stated that the cost-share rates should be increased from the current maximum of 70% (suggestions ranged from 80-100%). Many argue that the rates are too low and limit their ability to make a profit, and that cost sharing should cover other things besides BMP installation, such as labor, time, equipment and lost revenue.

Response: The department believes that the 70 percent statutory maximum (90 percent for hardship cases) plus the provisions to cover the reasonable in-kind producer contributions for equipment, labor and supplies are sufficient to meet the performance standards and prohibitions. Also, local governments may add cost sharing from local or federal funding sources to the state cost share.

One alternative suggested by a producer was to create innovative ways of sharing equipment, which the department would encourage at the local level. Another suggested a money-back guarantee for trying practices on his land.

Response: The department has a long history of paying in full for demonstration projects to test new practices, but cannot offer the suggested guarantee for already tested practices.

Several farmers and agricultural associations commented that new operations should be eligible for the same cost sharing as existing operations and one farmer commented that very small agricultural operations (hobby farms) should be exempt from the rules.

Response: The department is not required, by statute, to offer cost sharing to new operations (defined as those that come into existence after Oct. 14, 1997, the effective date of 1997 Act 27), but has the option to do so. The rationale is that new operations can more easily factor the performance standards and prohibitions into the farm plan and design thereby avoiding the more expensive retrofitting that some existing operations might need to undertake. Regarding small operations, the department recognizes that any operation could contribute polluted runoff no matter what size and views these performance standards and prohibitions as minimum standards that all agricultural operations need to implement to meet water quality standards.

Many farmers commented that the rule will require them to take too much land out of production and they should be compensated for that loss.

Response: The department believes this is no longer an issue since it has removed the water quality corridor and the concentrated flow channel performance standards from the rules.

Another issue raised concerns the selection of an option to predict soil loss in the sheet, rill and wind erosion performance standard. Among three options, crop consultants, agronomists and some farmers prefer Option 2, which is the use of a locally-selected tool, formula or model with the producer having final say in the event of conflicting agency choices. There was also support from a farmer for Option 3, which dictates the use of one tool, formula or model statewide with the caveat that the model be RUSLE II.

Response: The department intends to support RUSLE II if it is published prior to final rule approval.

Several farmers commented on the concentrated flow channel performance standard arguing for more flexibility to implement it, exemptions for drainage ditches and objections to additional land being taken out of production.

Response: These comments lend themselves not to the performance standards, but to the technical standard that implements it. The department removed this performance standard from the rule but continues to allow cost sharing for waterway systems installed on a voluntary basis.

Many producers raised issues about the water quality corridor (buffer) performance standard, including the previously addressed issues of the need for increased cost sharing and compensation for land taken out of production. They commented that maintenance will be difficult, fencing should not be required, more flexibility is needed to account for varying slopes, buffers will prevent some fields from draining resulting in unproductive land, buffers will result in more weeds and wildlife damage, and drainage ditches should be exempt.

Response: The department removed water quality corridors as a required performance standard but remains committed to the concept of riparian buffers and will allow cost sharing for the voluntary installation of buffers.

A few farmers commented that the clean water diversion performance standard will be difficult to comply with, there should be exemptions based on the amount of animal units in an operation and producers should not have to pay for damage to clean water diversions by acts of nature.

Response: The department feels that clean water diversions are a critical component to protect water quality and, in the vast majority of cases, are economical and cost-effective. The rules contain a provision that allows for cost sharing to replace or repair BMPs damaged by acts of nature.

Several issues regarding the nutrient management performance standard were raised by farmers and crop consultants including increased costs to agricultural operations, increased workload and record-keeping for both farmers and crop consultants, and the need for flexibility to allow for weather events and crop needs. They commented that the performance standard will cause more manure storage facilities to be built, which will be expensive and could have potential environmental and human consequences in the event of a spill, and that spreading manure in spring rather than year round would result in more soil compaction and the potential for more runoff. One farmer suggested that the government could offer free soil testing while another said that cost sharing for nutrient management should be continuous throughout the life of the plan. Both farmers and crop consultants commented that the requirement to adopt NRCS Standard 590 will be costly, ineffective, too complicated and ignores new research. Many farmers commented that the technical standard should remain nitrogen-based rather than moving to a phosphorus-based standard. Farmers with rotational grazing operations stated that the performance standard was a burden to them and presented particular problems to their operations. Several farmers commented that they should be allowed to write their own nutrient management plans.

Response: The costs to develop and implement nutrient management plans are eligible for cost sharing for up to four years, which the department sees as a reasonable amount of time to make the necessary management changes. Over time the nutrient management plan often results in cost savings to the producer as will accurate record keeping (less over application means less commercial fertilizer may need to be purchased). Any manure storage facilities that would be needed are cost sharable and should not present an environmental threat if managed properly. The department removed the requirement to adopt NRCS Standard 590 (the source of some of the restrictions cited) from the performance standard and instead references the technical standards in ATCP 50. The department addressed the concerns of graziers by removing the applicability of the performance standard to fields dedicated to pastures or rotational grazing provided nutrients other than that directly deposited by the livestock are not applied. DNR supports the concept of farmers writing their own nutrient management plan.

Non-Agricultural

Representatives of the building and housing industry, an engineering/land surveying firm and a concrete company raised the following several issues about the infiltration performance standard: 1) it will increase costs (by as much as 10%), 2) it will discourage development in urban areas because additional land must be set aside, thus contributing to sprawl, 3) technical standards are needed for successful compliance, 4) the standard needs more testing, 5) infiltration systems have a high failure rate, 6) there is a potential for groundwater contamination with this standard.

Response: In response to these comments, the department modified the infiltration performance standard so that less land would need to be set aside thereby reducing costs and sprawl.

However, the department contends that in most developments the performance standard can be met through modifications in design, source controls and design considerations.

An engineering/land surveying firm and representatives of the building and housing industry also objected to the addition of a requirement that storm water plans are needed for disturbances of 10,000 sq. ft. along a navigable waterway. They state that this requirement was not discussed by the workgroup and requires an analysis of costs, land use implications and environmental impacts.

Response: The department has removed this requirement in both the non-agricultural and the transportation performance standards.

A developer commented that the buffer performance standard amounted to a takings (this same comment was made by farmers regarding the water quality corridor (buffer) agricultural performance standard and a turf manager commented that the 5 acre threshold was onerous.

Response: The department feels that the buffer requirement is necessary to protect sensitive areas next to a stream or lake and the shoreline. Regarding the takings issue, the department relied on the Wisconsin Supreme Court ruling that land use regulations are “takings” only when they render an entire property useless for all practical purposes. The code requirement for up to 75-foot buffers will rarely, if ever, render an entire property useless, and so the code should not give rise to takings claims.

Representatives of the housing industry commented that the curve numbers used to determine peak discharge rates are unreasonable, extremely difficult to meet and will contribute to urban sprawl by requiring an unnecessary amount of land.

Response: The department feels the numbers in the code are necessarily conservative to protect water quality. The numbers are used in the technical standard for wet detention basins and were arrived at through much deliberation of a team of technical experts. However, the department did adjust the numbers somewhat to address these concerns.

Many turf managers, including golf course managers and supervisors, objected to the performance standard requiring a soil test and integrated pest management (IPM) plan before nutrients and pesticides could be applied to turf areas of 5 acres or more. They commented that IPM plans are difficult, and will require additional expense and paperwork; that golf course owners should receive education rather than regulation, and that it's a mistake to rely too much on soil tests because there is no good soil test for N, samples are hard to collect and lab results vary. The most comments were objections to a note suggesting the planting of native plants instead of turf grasses, like Kentucky bluegrass.

Response: The department intends to continue its education program with UWEX with attention paid to turf managers, but the Natural Resources Board felt strongly that these areas should be regulated and the department added this performance standard. In response to the comments, the department added alternatives to soil testing for nitrogen, identified alternative methods for fertilizer application and has eliminated the requirement for pesticide management through integrated pest management (IPM) plans, recognizing DATCP's authority to regulate pesticides.

For the transportation performance standards, one issue raised by a small business was the extra difficulty and cost to infiltrate transportation facilities.

Response: The department removed the requirement to infiltrate highways and high traffic roads.

III. Reports required by the rules that must be submitted by small business and an estimated cost of preparation.

Most small businesses regulated by these rules are not required to submit reports to the department. As noted above, CAFOs are already required to report annually as part of their WPDES permit. The rules do not change this. A change in proposed NR 243 puts the burden of applying for a WPDES permit on an operation under 1,000 animal units if it meets the definition of a point source under the Clean Water Act. This requirement may potentially increase the number of livestock operations that are required to report to the department.

IV. Measures or investments that small business must take to comply with the rule and estimates of the associated cost.

Any costs to small businesses resulting from the performance standards and prohibitions have been added as appendices 1 and 2 to the Fiscal Estimate for NR 151. Please refer to Appendix 1 for agricultural costs and Appendix 2 for non-agricultural costs.

V. Additional cost to the state in administering or enforcing the rules that include any of the methods listed in 1. A-E.

Any additional cost to the state has been included in the Fiscal Estimates for each rule.

VI. Impacts on public health, safety and welfare caused by including in the rule any of the methods listed in I. A-E.

Implementation of these rules is expected to result in improved water quality with subsequent benefits to public health, safety and welfare. More details are included in the Environmental Assessment.